IN THE SUPREME COURT OF FLORIDA

HECTOR SANCHEZ-TORRES,

Appellant/Petitioner,

v.

CASE Nos. SC19-211, SC19-836
L.T. No. 102009CF000671000AMX

STATE OF FLORIDA,

DEATH PENALTY CASES

Appellee.

MARK S. INCH,

Respondent
_____/

STATE'S RESPONSE TO MOTION TO PERMIT SUPPLEMENTAL BRIEFING AFTER APPEAL

I. APPELLANT'S MOTION IS UNAUTHORIZED.

Appellant appears to concede that his motion is unauthorized, but nonetheless argues that this Court should entertain the motion in order to correct a purported miscarriage of justice. *See* Motion, p.1 ("[Appellant] brings to this Court's attention a matter that may be outside the technical scope of a rehearing motion under Rule 9.330, but nevertheless calls for the exercise of this Court's inherent authority to correct miscarriages of justice on appeal."); *but see* Article V, § 3(b), Fla. Const. (Establishes the bases for the exercise of this Court's jurisdiction, but does not include any reference to an inherent authority to correct

miscarriages of justice on appeal); *but see also* Fla. R. App. P. 9.330(a)(2) (Listing the types of authorized motions, but does not include a motion to correct miscarriages of justice on appeal.). Because neither the Florida Constitution nor the Florida Rules of Appellate Procedure authorize a motion to correct a miscarriage of justice on appeal, the instant motion is unauthorized.

In addition to the foregoing, Rule 9.330(b) limits the number of motions an appellant may file. *See* Fla. R. App. P. 9.330(b) ("A party shall not file more than 1 motion for rehearing, clarification, certification, or written opinion with respect to a particular order or decision of the court. All motions filed under this rule with respect to a particular order or decision must be combined in a single document."). Appellant concedes that he already filed a motion for rehearing in this case. *See* Motion, p.1 ("[Appellant] has filed a motion for rehearing of that decision under Fla. R. App. P. 9.330."). Because the Florida Rules of Appellate Procedure do not authorize multiple motions, the instant motion is unauthorized.

To the extent Appellant argues that Rule 9.330(b) does not limit his ability to file the instant motion because the motion is filed outside of Rule 9.330, then Appellant eliminates any basis upon which to file his motion. *See generally* Motion, p.6 ("Appellant is simply requesting something analogous to rehearing and clarification, while recognizing that this Court's erroneous decision in this case

was based on deficient appellate representation that may have not been apparent to the Court at the time.").

Thus, whether filed under or outside of Rule 9.330, the Motion to Permit Supplemental Briefing After Appeal should be "stricken as unauthorized." *Rozier v. Southgate Campus Ctr.*, 91 So. 3d 133 (Fla. 2012).

II. APPELLANT RAISES A CLAIM OF INEFFECTIVE ASSISTANCE OF COLLATERAL APPELLATE COUNSEL

By arguing that this Court enjoys the inherent authority to rehear, from the beginning, a postconviction appeal and a petition for writ of habeas corpus, Appellant raises a claim of ineffective assistance of collateral appellate counsel cloaked as a miscarriage of justice claim. Furthermore, Appellant fails to cite any legal authority to support the basis for his claim. *But see generally Episcopal Ret. Homes, Inc. v. Ohio Dep't of Indus. Relations*, N.E.2d 606, 610 (Ohio 1991) (Resnick, J., dissenting) ("Rather than address the propriety of amicus curiae's right to file a motion for rehearing, a majority of this court chose to exercise its inherent authority to correct a miscarriage of justice and proceed to *sua sponte* rehear the case.").

As to the disguised ineffective assistance claim, Appellant argues that previous collateral appellate counsel's deficient performance caused the alleged miscarriage of justice. *See* Motion, p.2 ("[Appellant] submits that supplemental briefing is appropriate because of [previous collateral appellate counsel's]

inadequate briefing. This Court was led astray as to several points of law and fact that deserve reconsideration in order to avoid a miscarriage of justice in [Appellant's collateral] appeal."); *see also* Motion, p.4 ("This is exactly the kind of deficient representation that this Court had gone out of its way to comment on in the past."); Motion, p.5 ("The decision by [previous collateral appellate counsel] to drop several meritorious claims was entirely unreasonable and without any possible strategy."); *but see Coleman v. Thompson*, 501 U.S. 722, 752 (1991), holding modified by *Martinez v. Ryan*, 566 U.S. 1 (2012):

> There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See Wainwright v. Torna*, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance).

Not expressly acknowledged in Appellant's motion, this Court does not recognize ineffective assistance of collateral counsel claims – even in capital cases. *See Asay v. State*, 210 So.3d 1, 28 (Fla. 2016) ("To the extent that Asay is instead attempting to argue ineffective assistance of counsel, this Court has repeatedly held that defendants are not entitled to effective assistance of collateral counsel."); *see also Finney v. State*, 192 So.3d 36 (Fla. 2015); *Ford v. State*, 168 So.3d 224 (Fla. 2015); *Kormondy v. State*, 154 So.3d 341, 354 (Fla. 2015); *Banks v. State*, 150 So.3d 797, 800 (Fla. 2014); *Moore v. State*, 132 So.3d 718, 724 (Fla. 2013);

Chavez v. State, 129 So.3d 1067 (Fla. 2013); *Howell v. State*, 109 So.3d 763, 774 (Fla. 2013); *Gore v. State*, 91 So.3d 769, 778 (Fla. 2012).

Appellant appears to concede that the Sixth Amendment alone cannot support a claim of ineffective assistance of collateral counsel; to avoid that limitation, however, Appellant invokes the death penalty and appears to raise a novel claim of ineffective assistance based upon both the Sixth and the Eighth Amendments. *See* Motion, pp. 4-5:

> There is a constitutional requirement that appellate counsel, in order to provide effective assistance of counsel, raise all arguable meritorious claims during direct review. While this constitutional requirement has not been explicitly required of collateral appellate counsel, prevailing professional norms demand the exact same requirement, particularly in a death penalty case, to argue all arguable meritorious issues.

To the extent he argues that the Eighth Amendment can support a claim of ineffective assistance of collateral appellate counsel that the Sixth Amendment alone could not, Appellant fails to cite any legal authority in Florida to support that proposition.[1] *See generally* Motion, p.11 ("Particularly because this is a capital case…"). In direct opposition to such a proposition, however, every decision from

[1] To the extent he alleges a Due Process violation, Appellant merely presents a generalized claim without any specificity. *See e.g.* Motion, p.4 ("[Appellant] did not receive effective representation and that basis requirement of due process was not met."); *see also id.* p.5 ("Because this Court did not have the opportunity to review the meritorious claims, due process has been denied for [Appellant].").

this Court cited above is a death penalty case. This very fact would seem to discredit Appellant's novel claim.

Furthermore, absent the United States Supreme Court expressly holding that the Eighth Amendment can support such a claim, the Conformity Clause of the Florida Constitution prohibits any relief. *See Correll v. State*, 184 So.3d 478, 489 (Fla. 2015) ("[T]his Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court."); *see also Yacob v. State*, 136 So.3d 539, 558 (Fla. 2014) (Canady, J., concurring in part and dissenting in part):

> Under this provision of article I, section 17—commonly referred to as the conformity clause—the courts of Florida are precluded from determining that a sentence is cruel and unusual if a decision of the United States Supreme Court makes clear that the sentence does not violate the Eighth Amendment of the federal constitution. Moreover, a sentence may be invalidated as cruel and unusual under the Florida Constitution by a Florida court only if a decision of the United States Supreme Court requires invalidation of the sentence as cruel and unusual.

III. *MARTINEZ V. RYAN*

Although Appellant does not expressly rely on the United States Supreme Court decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), his claim is nonetheless similar. Compare Motion, p.2 ("[Previous collateral appellate counsel] failed to brief most of [Appellant's] claims entirely and omitted other critical facts and

arguments.") with *Martinez*, 566 U.S. at 5 ("On federal habeas review, and with new counsel, petitioner sought to argue he had received ineffective assistance of counsel at trial and in the first phase of his state collateral proceeding.").

To the extent Appellant raises a *Martinez* claim, the State provides the following analysis.

Coleman

"In [*Coleman v. Thompson*, 501 U.S. 722 (1991)], the Supreme Court held that ineffective assistance of state postconviction counsel could not supply cause to overcome a procedural default, reasoning that because there is no right to counsel at that stage, counsel's deficient performance would not amount to a violation of a petitioner's Sixth Amendment right to counsel and, therefore, could not be seen as an objective factor external to the defense." *Harris v. Comm'r, Alabama Dep't of Corr.*, 874 F.3d 682, 690 n.11 (11th Cir. 2017).

Martinez* provides a "narrow exception" to *Coleman

Twenty years later, the "*Coleman* holding was modified by *Martinez*, in which the Supreme Court held that ineffective assistance of state postconviction counsel can in some circumstances supply cause to excuse a procedural default [that would otherwise bar consideration of a Federal habeas claim of ineffective assistance of trial counsel]." *Harris*, 874 F.3d at 690 n.11.

Now, in states where a defendant cannot raise a claim of ineffective assistance of trial counsel on direct appeal, *Martinez* allows a habeas petitioner to raise an otherwise barred claim of ineffective assistance of trial counsel in Federal court if collateral counsel's ineffectiveness during the initial-review collateral proceeding caused the procedural bar of the ineffective assistance of trial counsel claim. *See Ayestas v. Davis*, 138 S. Ct. 1080, 1087 (2018) ("*Martinez* held that an Arizona prisoner seeking federal habeas relief could overcome the procedural default of a trial-level ineffective-assistance-of-counsel claim by showing that the claim is substantial and that state habeas counsel was also ineffective in failing to raise the claim in a state habeas proceeding."); *see also Smith v. Warden, Macon State Prison*, No. 18-13801, 2020 WL 615034, at *7 (11th Cir. Feb. 10, 2020) ("In *Martinez*, the Supreme Court held that ineffective assistance by a prisoner's state postconviction counsel is cause to overcome the procedural default of an ineffective trial counsel claim, but only when the state effectively requires a defendant to bring the ineffective trial counsel claim in a state postconviction proceeding, rather than on direct appeal.").

The "narrow exception" recognized in *Martinez* only applies in a limited context: where ineffective assistance of collateral counsel prevents a habeas petitioner from raising a claim of ineffective assistance of trial counsel in Federal court. *See Martinez*, 566 U.S. at 9 ("This opinion [recognizes] a narrow exception:

Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."); *see also Davila*, 137 S.Ct. at 2062–63 ("[The *Martinez*] exception treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim—ineffective assistance of trial counsel—in a single context—where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal."); *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 945 (11th Cir. 2014) ("What the *Martinez* decision did—and the only thing it did—was create a narrow, equitable exception to the general rule that a petitioner cannot rely on the ineffectiveness of collateral counsel to serve as cause for excusing the procedural default of a claim in state court, thereby permitting federal habeas review of the merits of that claim.").

Martinez affords an equitable remedy;
it does not create a Constitutional right

Martinez does not recognize a Constitutional claim of ineffective assistance of collateral counsel; rather, *Martinez's* narrow exception authorizes equitable relief under the Federal habeas statute. *See Davila*, 137 S.Ct. at 2066 ("The Court in *Martinez* made clear that it exercised its equitable discretion in view of the unique importance of protecting a defendant's trial rights, particularly the right to effective assistance of trial counsel."); *see also Arthur v. Thomas*, 739 F.3d 611,

629 (11th Cir. 2014) ("The *Martinez* rule is not a constitutional rule but an equitable principle."); *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957 (11th Cir. 2016):

> While defendants do not have a constitutional right to the effective assistance of counsel on collateral review, ineffective assistance of counsel in an "initial-review collateral proceeding" can constitute cause and prejudice to excuse a procedural default if the collateral proceeding was the first opportunity the defendant had to raise the procedurally defaulted claim.

See also Hamm v. Comm'r, Alabama Dep't of Corr., 620 F. App'x 752, 763 (11th Cir. 2015) ("The Court thus established an equitable, rather than constitutional rule, that permits a prisoner to overcome default of a trial-counsel claim when that claim can be raised for the first time only in a collateral proceeding…").

Without that relief, no court might ever hear a petitioner's claim of ineffective assistance of trial counsel in some types of cases. *See Martinez*, 566 U.S. at 10-11 ("[I]f counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims."); *see also Davila*, 137 S.Ct. 2067:

> *Martinez* was concerned that a claim of trial error—specifically, ineffective assistance of trial counsel—might escape review in a State that required prisoners to bring the claim for the first time in state postconviction proceedings rather than on direct appeal… If postconviction counsel… fails to raise the claim, no state court will ever review it. Finally, because attorney error in a state postconviction proceeding does not qualify as cause to excuse procedural default under *Coleman*, no federal court could consider the claim either.

Martinez does not apply to appellate counsel

In reaching its decision in *Martinez*, the Court drew a comparison between an appeal and the initial-review collateral proceedings in States that do not allow defendants to bring ineffective assistance of trial counsel claims on direct appeal. *See Khianthalat v. Sec'y, Dep't of Corr.*, No. 17-11977-B, 2017 WL 9285601, at *5 (11th Cir. Dec. 20, 2017):

> The Supreme Court reasoned that, where an initial-review collateral proceeding is the first opportunity for a prisoner to raise a claim of ineffective assistance of trial counsel, that proceeding is in many ways the equivalent of a direct appeal as to the ineffective-assistance claim because, if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.

Nonetheless, *Martinez* does not provide relief when appellate counsel creates the procedural default. *See Woods v. Holman*, No. 18-14690-P, 2019 WL 5866719, at *6 (11th Cir. Feb. 22, 2019), quoting *Martinez*, 566 U.S. at 14 ("[*Martinez*] does not apply to procedural defaults of ineffective assistance claims on direct appeal, but only to defaults by postconviction counsel when state law 'requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding.'"); *see also Luciano v. Sec'y, Dep't of Corr.*, 701 F. App'x 792, 794 (11th Cir. 2017) ("Any broadening of *Martinez* to excusing a default of ineffective-appellate-counsel claims would ignore the Supreme Court's emphatic statements that *Martinez* creates only a narrow exception…").

The Court in *Martinez* expressed a clear concern that the ineffective assistance of initial-review collateral counsel may preclude consideration of a valid claim of ineffective assistance of trial counsel; however, that concern is not present in the context of appellate counsel. *See Davila*, 137 S.Ct. 2067 ("Claims of ineffective assistance of appellate counsel, however, do not pose the same risk that a trial error—of any kind—will escape review altogether…"). For a preserved error, the trial court enjoyed the opportunity to address the alleged error when trial counsel lodged an objection. *See Davila*, 137 S.Ct. at 2067, quoting *Martinez*, 566 U.S. at 11 ("If trial counsel preserved the error by properly objecting, then that claim of trial error 'will have been addressed by ... the trial court.'"). For an unpreserved error, the failure to object could provide the basis for a claim of ineffective assistance of trial counsel. *See Davila*, 137 S.Ct. at 2067-68 ("If an unpreserved trial error was so obvious that appellate counsel was constitutionally required to raise it on appeal, then trial counsel likely provided ineffective assistance by failing to object to it in the first instance."). Because the performance of appellate counsel does not jeopardize the consideration of substantial claims in the way that the performance of initial-review collateral counsel can jeopardize them, the Court declined to extend *Martinez's* equitable exception to appellate counsel. *See Davila*, 137 S.Ct. at 2068 ("[An extension of

Martinez is] unnecessary for ensuring that trial errors are reviewed by at least one court.").

Martinez does not apply to appeals from initial-review collateral proceedings, successive collateral proceedings, or petitions for discretionary review in State appellate courts

In *Martinez*, the Court focused on trial errors – specifically the impact of the performance of initial-review collateral counsel on the ability to raise a claim of ineffective assistance of trial counsel. *See Davila*, 137 S.Ct. at 2066 ("[T]he Court in *Martinez* was principally concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel.") (emphases in original); *see also Gore v. Crews*, 720 F.3d 811, 816 (11th Cir. 2013) ("By its own emphatic terms, the Supreme Court's decision in *Martinez* is limited to claims of ineffective assistance of trial counsel that are otherwise procedurally barred due to the ineffective assistance of post-conviction counsel.").

Consequently, *Martinez* does not apply to appeals from initial-review collateral proceedings, successive collateral proceedings, or petitions for discretionary review in State appellate courts. *See Martinez*, 566 U.S. at 16 ("The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts."); *see also Baker v. Dep't of Corr., Sec'y*, 634 F. App'x 689, 693 (11th Cir.

2015) ("This exception does not extend to attorney errors made in appeals from initial-review collateral proceedings.").

Martinez only applies to Federal habeas proceedings

Martinez enjoys limited application, as it only applies to federal habeas proceedings. *See Banks v. State*, 150 So.3d 797, 800 (Fla. 2014) ("Martinez addressed circumstances in which a defendant can raise a claim in a federal habeas petition that he did not raise in state proceedings… We have held that *Martinez* applies only to federal habeas proceedings..."); *see also Gore v. State*, 91 So.3d 769, 778 (Fla. 2012) ("It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context.").

Martinez does not provide an independent basis for relief in state court proceedings

An important point that distinguishes it from a claim of ineffective assistance of collateral counsel, *Martinez* relief does not provide a Federal habeas petitioner with a new state court proceeding in which he may raise his claim of ineffective assistance of trial counsel. *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1249 (11th Cir. 2014) ("*Martinez* did not create a freestanding claim for relief based on ineffective state collateral counsel and provides no basis to reopen Lambrix's time-barred and impermissibly successive claims.").

In other words, *Martinez* does not create a Constitutional right to the effective assistance of collateral counsel which, if violated, would entitle a defendant to a new collateral proceeding. *See Lambrix v. State,* 139 So.3d 298 (Fla. 2014) ("[T]his Court has rejected the argument that *Martinez* creates a constitutional right to raise effective assistance of collateral counsel in state proceedings.").

Instead, *Martinez* only allows a habeas petitioner to avoid a procedural bar that would otherwise prevent consideration, in Federal court, of a claim of ineffective assistance of trial counsel. *See Davila v. Davis*, 137 S.Ct. 2058, 2065 (2017), quoting *Martinez*, 566 U.S. at 17 ("'[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if' the default results from the ineffective assistance of the prisoner's counsel in the collateral proceeding.").

Thus, *Martinez* does not provide any basis for relief in state court. *See Howell v. State*, 109 So.3d 763, 774 (Fla. 2013):

> *Martinez* addresses a very narrow issue: whether a federal court reviewing a petition filed under 28 U.S.C. § 2254 can excuse the procedural default that occurred during state proceedings where a defendant was denied his right to effective assistance of trial counsel and has been unable to raise this claim in the state proceedings because postconviction counsel rendered ineffective assistance in failing to raise the claim in the initial-review collateral proceedings. As this Court has made clear, though, *Martinez* does not provide an independent basis for relief in state court proceedings.

See also Finney v. State, 192 So.3d 36 (Fla. 2015) ("[W]e have repeatedly held that a defendant cannot bring ineffective assistance of postconviction counsel claims in state proceedings based on *Martinez*.").

IV. CONCLUSION

Appellant's Motion to Permit Supplemental Briefing After Appeal should be "stricken as unauthorized." *Rozier*, 91 So. 3d 133. Alternatively, Appellant's disguised claim of ineffective of collateral appellate counsel should be denied, as "this Court has repeatedly held that defendants are not entitled to effective assistance of collateral counsel." *Asay*, 210 So.3d at 28.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Karin L. Moore, Esq., Karin.Moore@ccrc-north.org, Counsel for Appellant, this 1st day of May, 2020.

/s/*Michael T. Kennett*
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